SUPREME COURT, U.S.
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No. 94-374

In the Supreme Court of the United States

OCTOBER TERM, 1994

CALVIN J. WEBER, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Merit Systems Protection Board has authority under the Whistleblower Protection Act of 1989, 5 U.S.C. 2302 (1988 & Supp. V 1993), to review an agency's notice of intent to revoke an employee's security clearance.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1)[1] is unpublished, but is noted at 26 F.3d 140 (Table). The initial decision of the administrative law judge (ALJ) of the Merit Systems Protection Board (MSPB) in Docket No. SL1221920398W1 (Pet. App. 45-53) is unreported. The opinion and order of the MSPB remanding for another hearing (Pet. App. 27-34) is reported at 56 M.S.P.R. 605. The decision of the ALJ on remand (Pet. App. 15-26) is unreported. The initial decision of the ALJ of the MSPB

[1] To facilitate reference to the opinions below, we have numbered the pages of petitioner's appendices consecutively, beginning with the first unnumbered page following the argument section of the petition.

in Docket No. SL1221930022W1 (Pet. App. 35-44) is unreported. The opinion and order of the MSPB in the consolidated appeal of both decisions (Pet. App. 2-14) is reported at 59 M.S.P.R. 293.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1994. The petition for a writ of certiorari was filed on August 3, 1994. The petition invokes the Whistleblower Protection Act of 1989, 5 U.S.C. 2302 (1988 & Supp. V 1993), as the basis for this Court's jurisdiction. The proper basis for this Court's jurisdiction is 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was employed for several years as an electronics engineer by the United States Department of the Army and held a security clearance in connection with the performance of his job duties. On July 7, 1992, the Army sent petitioner a Letter of Intent to revoke his security clearance. See C.A. Supp. App. 24-27.[2] This action was based, in part, on a Federal Bureau of Investigation (FBI) report determining that petitioner had intentionally disclosed classified information to unauthorized persons, including representatives of the news media. *Id.* at 25-26. The FBI report noted that petitioner's disclosures occurred during Operation Desert Shield in the fall of 1990 and had "identified specific vulnerabilities of military aircraft, the estimated number of aircraft affected by these

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[2] "C.A. Supp. App." refers to the Supplemental Appendix filed in the court of appeals with the Brief for respondent MSPB.

vulnerabilities, and the deployment and location of these aircraft." A.F. Tab 1b, at 2.[3]

In accordance with 32 C.F.R. 154.56, the Letter of Intent set forth a detailed list of the factual bases for the revocation of petitioner's security clearance, advised petitioner that he had 60 days in which to explain or refute these allegations, and instructed petitioner how to obtain a copy of his investigative file. The letter also informed petitioner that his access to classified information was suspended until a final determination was made on the security clearance. C.A. Supp. App. 24-27.

Petitioner responded to the notice on September 8, 1992 (A.F. Tab 1d). On September 30, 1992, the Army's reviewing security officer affirmed his initial recommendation that petitioner's security clearance be revoked. He noted that petitioner's response had not addressed the "primary security concern," which was the "intentional release of classified information to unauthorized media representatives (as substantiated by the FBI)." A.F. Tab 4a. In the meantime, petitioner sought corrective action from the MSPB's Office of Special Counsel (OSC). Pet. App. 3. On August 19, 1992, the OSC notified petitioner that it had found no evidence of any prohibited personnel practices towards him on the part of the Army. *Id.* at 30.

2. Petitioner appealed to the MSPB. He alleged that the Army was proposing to revoke his clearance in retaliation for disclosures he had made concerning government waste and unsafe practices, in violation of

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[3] "A.F." refers to the Army's agency file on the case, which was submitted to the MSPB in connection with petitioner's first appeal, Docket No. SL1221930022W1. The documents within this file were tabbed but not sequentially numbered before the Board, and are identified herein by their tab number and letter.

the Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. 2302 (1988 & Supp. V 1993). Pet. App. 47. On April 27, 1993, following a remand for procedural reasons,[4] the MSPB's administrative law judge (ALJ) dismissed petitioner's appeal for lack of jurisdiction. The ALJ stated that the Army's Letter of Intent to revoke petitioner's security clearance did not constitute a "personnel action" under 5 U.S.C. 2302(a)(2)(A), and thus petitioner's claim was not cognizable under the statute. Pet. App. 22-23.[5] While this appeal was pending, petitioner filed a second appeal of the Army's action with the MSPB. On February 16, 1993, a second ALJ dismissed this appeal, also finding that a revocation of a security clearance did not constitute a specified "personnel action" subject to the WPA. Pet. App. 39-40.

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[4] Petitioner's appeal was initially dismissed for lack of jurisdiction under 5 U.S.C. 1214(a)(3) (Supp. V 1993), because petitioner failed to demonstrate that the OSC had terminated its investigation or that 120 days had elapsed since petitioner had sought corrective action from the OSC. The MSPB remanded petitioner's appeal for further adjudication since, by the time the MSPB considered petitioner's appeal from the dismissal, 120 days had elapsed. Pet. App. 31-32.

[5] The WPA identifies certain prohibited personnel practices and bars agencies from taking certain "personnel actions" against employees. Neither "personnel actions," as defined in Section 2302(a)(2)(A), nor "adverse actions," as defined in the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 7501 *et seq.*, nor performance evaluations under the CSRA, 5 U.S.C. 4301 *et seq.*, which are included by reference, include the denial or revocation of a security clearance. Moreover, 5 U.S.C. 2302(b)(8) (Supp. V 1993) excludes from the coverage of the WPA unauthorized disclosures by employees of information required by Executive order to be protected in the interest of national defense or foreign affairs.

Petitioner petitioned the MSPB for review of the decisions of both ALJs. Pet. App. 2. The MSPB consolidated the two appeals. The MSPB then affirmed the ALJ decisions and ordered the appeals dismissed. It reasoned that a notice of intent to revoke a security clearance is analogous to an order to take a fitness-for-duty examination, which the MSPB has held not to constitute a "personnel action" under 5 U.S.C. 2302(a)(2)(A)(iii). Pet. App. 11. Because petitioner had not shown that he had been subjected to a personnel action, the MSPB did not consider his claim that his clearance had been withdrawn in retaliation for protected whistleblowing. *Id.* at 12.

3. On May 13, 1994, the Federal Circuit summarily affirmed the MSPB's decision. Pet. App. 1.

ARGUMENT

1. The MSPB correctly held that notification of intent to revoke a security clearance does not constitute a "personnel action" under the Whistleblower Protection Act of 1989 (WPA). Under 5 U.S.C. 1221 (Supp. V 1993), the MSPB has jurisdiction to hear appeals from employees seeking corrective action with respect to any "personnel action" either threatened or taken against them that constitutes a prohibited personnel practice. See 5 C.F.R. 1209.2(b)(1), 1209.4.[6] A "personnel action" is defined in 5 U.S.C. 2302(a)(2)(A) as:

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[6] Prohibited practices include, *inter alia*, discrimination on the basis of race, color, religion, sex, national origin, or handicapping condition, 5 U.S.C. 2302(b)(1), coercion on the basis of political activity, 5 U.S.C. 2302(b)(3), and reprisals against an employee for disclosing information reasonably believed to evidence violations of the law, gross mismanagement, gross waste of funds, or an abuse of authority, 5 U.S.C. 2302(b)(8) (Supp. V 1993).

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

(iv) a detail, transfer, or reassignment;

(v) a reinstatement;

(vi) a restoration;

(vii) a reemployment;

(viii) a performance evaluation under chapter 43 of this title;

(ix) a decision concerning pay, benefits, or awards, concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; and

(x) any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level.

Neither a denial nor a revocation of a security clearance is listed among these "personnel actions."

The MSPB (Pet. App. 20) and the court of appeals correctly rejected petitioner's claim that the proposed revocation of his security clearance constitutes "an action under chapter 75 of this title or other disciplinary or corrective action," under 5 U.S.C. 2302(a)(2)(A)(iii). Chapter 75 confers on the MSPB jurisdiction to review "adverse actions," a term limited to removals, suspensions for more than 14 days, reductions in grade or pay,

and furloughs of 30 days or less. 5 U.S.C. 7512, 7513(d). In *Department of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988), this Court held that the denial or revocation of a security clearance is not an "adverse action," and thus is not subject to Board review. *A fortiori*, a proposal to revoke a security clearance also does not constitute an "adverse action."[7]

A proposed revocation of a security clearance also does not constitute "other disciplinary or corrective action" under 5 U.S.C. 2302(a)(2)(A)(iii). In rejecting this argument, the MSPB properly applied the principle that, where general words follow specific words in an enumeration, the general words are construed to describe only things similar in nature to those described by the specific words; an "other disciplinary or corrective action" must therefore be similar "in . . . nature" to an action under Chapter 75. Pet. App. 20-21 & n.2; see *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 588 (1980). A revocation of a security clearance, however, is fundamentally different from the personnel actions described in Chapter 75 (removals, suspensions, reductions in grade or pay, and furloughs). Unlike those actions, the revocation of access to classified information is not aimed at punishing an employee, but is a step designed to prevent unauthorized disclosures that could cause damage to national security. As this Court recognized in *Egan*, "the protection of classified information must be committed to the broad discretion of

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[7] Petitioner appears to argue (Pet. 4) that *Egan* is inapposite because it did not involve whistleblowing. The "adverse action" concept, on which the *Egan* decision was based, derives from the same statutory section as is involved in this case, and nothing in *Egan* suggested that "adverse action" takes on different meanings depending on the factual context of the case.

the agency responsible, and this must include broad discretion to determine who may have access to it." 484 U.S. at 529. Access to classified information must be "clearly consistent with the interests of the national security." *Id.* at 528.

Moreover, even if revocation of a security clearance were to constitute a "personnel action" within the meaning of the WPA, petitioner's claim would still be unavailing. The WPA excludes from its protection disclosures that are "specifically prohibited by law" or that divulge information "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." 5 U.S.C. 2302(b)(8)(A) (Supp. V 1993). The revocation here was based on petitioner's having disclosed the specific vulnerabilities of military aircraft during Operation Desert Shield. His conduct therefore falls outside the protection of the whistle-blower statute. *Kent* v. *General Services Admin.*, 56 M.S.P.R. 536 (1993).

2. Petitioner also claims (Pet. 2) that the Army's proposed revocation of his security clearance abridged his constitutional due process rights. Contrary to petitioner's assertion (Pet. 5), agencies are not free to "rid [themselves of] federal employees for most any reason, including personal dislike of the individual." Rather, procedural safeguards, both within the agency and through the MSPB, provide employees with procedural due process for any adverse actions taken against them as the result of the loss of their security clearance. See *Egan*, 484 U.S. at 532-533; *id.* at 535 (White, J., dissenting). Petitioner pursued his MSPB remedy for removal from his job, and the Federal Circuit affirmed the Board's decision. See *Weber* v. *Department of the Army*, No. 94-3284 (Fed. Cir. Oct. 14, 1994).

Petitioner was also protected against arbitrary agency action with respect to the proposed revocation of his security clearance. The Army complied with its Personnel Security Program Regulations in issuing a Letter of Intent to revoke petitioner's security clearance and suspending his access to classified information. See 32 C.F.R. 154.56. Petitioner was provided a written statement of the reasons why the agency intended to revoke his security clearance, which detailed the factual basis for the proposed action. Petitioner was given 60 days in which to reply in writing to the allegations in the notice, and he availed himself of that opportunity. Since petitioner has no right to a security clearance, *Egan*, 484 U.S. at 528, these procedures were constitutionally adequate, *id.* at 533.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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